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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 546

GRACE W. YORK, et al.,
Plaintiffs,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,
Defendant.

EDWARD M. STEELE and HENRY M. STEELE, as Executors of the Estate of Emma W. Steele, GUS STERN, ELVA LAMBERSON, FIRST NATIONAL BANK OF STILLWATER, OKLAHOMA, et al.,
Petitioners,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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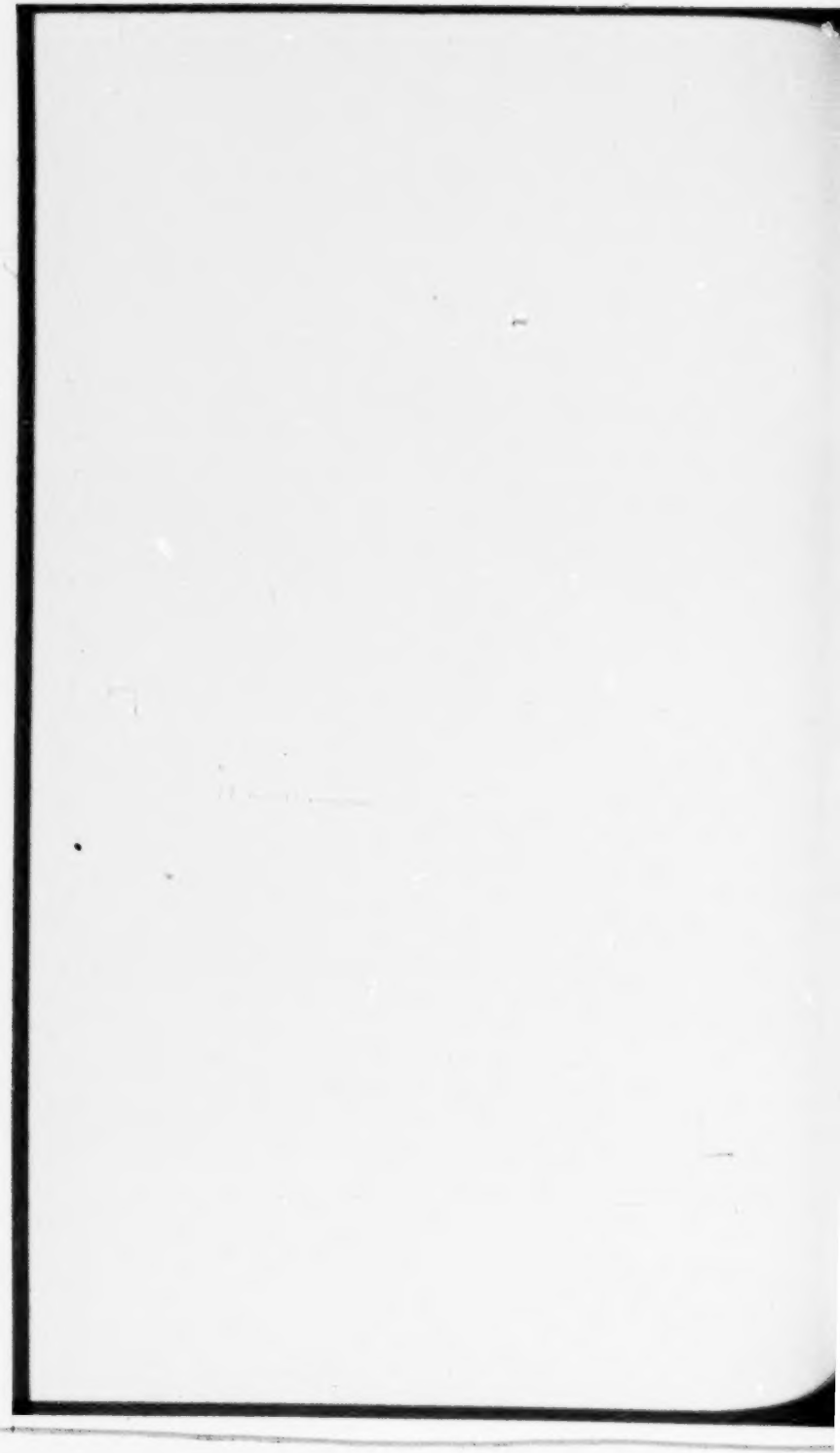
January 19, 1948.

Midwest Law Printing Co., 340 W. Huron St., Chicago



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Petitioners,

—against—

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the United States:

Edward M. Steele and Henry M. Steele, as Executors of the Estate of Emma W. Steele, deceased, Elva Lamberson, Gus Stern and First National Bank of Stillwater, Oklahoma, in their own right and for the common use and benefit of all noteholders of the class of $1,213,000 who were similarly situated, respectfully pray the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to reverse

its order and decision of December 8, 1947 which reversed the judgment of the United States District Court for the Southern District of New York sustaining respondent's motion for a summary judgment because of the bar of the action by the ten-year Statute of Limitations with directions to dismiss the action on the ground of lack of the jurisdictional amount and which denied a rehearing on December 22, 1947.

Summary Statement of the Matter Involved.

On January 22, 1942, within one year after the denial of certiorari by this court (313 U. S. 589) from the dismissal of Grace W. York as a party in the *Hackner* suit (117 F. (2) 95) on jurisdictional grounds, she filed this suit as owner of $6000 notes on behalf of the class of noteholders aggregating $1,213,000 of the $30,000,000 note issue of Van Sweringen Corporation, for the breach of trust of the respondent in consenting to and sponsoring the offer made to noteholders in the name of the corporation of October 29, 1931 whereby the class of the $1,213,000 were deprived of their share of the "assigned securities" and the respondent benefited therefrom to the extent of at least one-half of the amount. The trial court sustained respondent's motion for a summary judgment which was reversed on appeal (143 F. (2) 503). Certiorari was sought on eight questions, and allowed only on one of the questions, whether a federal court in an equity proceeding in a diversity case is bound by a State Statute of Limitations held to govern like cases by the State courts (323 U. S. 693). The question was academic then, as no such plea was filed, and was answered here in the affirmative (326 U. S. 999). However, the judgment stood affirmed on the seven other questions on which certiorari was denied. Because of

the opinion (143 F. (2) 503, 529) that all other noteholders of the class of $1,213,000 might intervene "before" or "after" trial and its suggestion to amend the complaint (143 F. (2) 503, 519), plaintiffs intervened the petitioners as additional plaintiffs and filed by leave of court an amended complaint (R. 1-19).

Respondent filed an answer which included as the first defense the plea of the six-year Statute of Limitations and as a second defense the plea of the ten-year Statute of Limitations (R. 51) and also moved to dismiss the suit as to all petitioners except "Baseball" on the ground of lack of the jurisdictional amount (R. 85), and as to "Baseball" on the ground of want of diversity of citizenship. The trial court did not dismiss the suit because of lack of jurisdiction but sustained the defense of the ten-year Statute of Limitations.

Petitioners, except Grace York, appealed. No cross appeal was taken by respondent from the refusal of the court to dismiss on jurisdictional grounds. The Court of Appeals reversed the judgment on the merits based on the bar of the Statute, with directions to dismiss the action for want of jurisdiction, except as to York who did not appeal. A petition for rehearing was filed which called to the attention of the court that the jurisdictional issue was raised below; that by the judgment on the merits the court sustained its jurisdiction, and that this became *res judicata* in the absence of an appeal by the respondent, and while it had the right to urge any reason in support of the judgment, it could not urge it to reverse the order and that the Court of Appeals was limited to determine the only issue upon which petitioners prosecuted the appeal, the bar of the action by the ten-year Statute of Limitations (R. 47). The rehearing was denied on the same day the petition was filed (R. 188).

QUESTIONS PRESENTED.

1. In a class action in which jurisdiction in the original proceedings is based on diversity of citizenship and the amount involved is in excess of $3,000, does the court have jurisdiction to permit the intervention of other claimants as new plaintiffs who lack the jurisdictional amount under Rules 23 (a) (3) and 24(b) of the Federal Rules of Civil Procedure.

2. In a class action in which jurisdiction is invoked on diversity of citizenship and the required amount, does the court have jurisdiction to permit intervention by other claimants of the class as plaintiffs under Rule 23 (a) (3) and 24 (b) of the Federal Rules of Civil Procedure, although there is no diversity of citizenship between such intervenors and the defendant.

3. Whether a decision in favor of jurisdiction may be reversed on an appeal from a judgment on the merits in the absence of an appeal on the jurisdictional question, and whether the judgment on the jurisdictional question became *res judicata* as to remove the question from review on appeal.

4. Whether a defendant whose motion to dismiss on jurisdictional grounds was denied and was successful in obtaining a judgment on the merits can relitigate the jurisdictional question on the appeal of the plaintiffs from the judgment on the merits, in the absence of an appeal or cross appeal by the defendant.

5. Whether the decision reversing the judgment on the merits below with directions to dismiss for lack of jurisdiction in the absence of an appeal on the decision in favor of the jurisdiction conflicts with the views of this court in *Stoll* v. *Gottlieb*, 305 U. S. 165, 174 and *Heise* v. *Woodruff*, 327 U. S. 726, 732, and with decisions of other Circuits.

REASONS FOR ALLOWING THE WRIT.

1. In holding that in the absence of an appeal from the determination in favor of the jurisdiction below the question of jurisdiction was open for review and in reversing the judgment on the merits with directions to dismiss for lack of jurisdiction the court of appeals:

(a) conflicted with the decision of the Sixth Circuit in *Orlander-Seymour* v. *Grand Rapids*, 50 F. (2) 567, certiorari denied here.

(b) disregarded the contrary decisions of this court in *Stoll* v. *Gottlieb*, 305 U. S. 165, 174 and *Hase* v. *Woodruff*, 327 U. S. 726, 732.

2. In holding that in a class action in which jurisdiction in the original proceedings is based on diversity of citizenship and the amount is in excess of $3,000 the court is without jurisdiction to permit the intervention of other claimants in the case under Rules 23 (a) (3) and 24 (b) of the Federal Rules of Civil Procedure, the court of appeals:

(a) failed to follow its own decision in the instant case (143 F. (2) 503, 529);

(b) conflicted with the decision of the third Circuit Court of Appeals as pointed out in the opinion of the District Court in *Shipley* v. *Pittsburgh & L. C. R. Co.*, 70 F. Supp. 870, 872.

3. The decision that in a class suit in which jurisdiction in the original proceedings is based on diversity of citizenship the court is without jurisdiction to permit intervention of a claimant in the case under Rules 23 (a) (3) and 24 (b) where there is a lack of diversity as to the new party the decision is in conflict with decisions of other courts.

4. The decision below involves important questions of federal procedure under Rules 23 (a) (3) and 24 (b) on which there is conflict in the decisions and the writ should be granted to harmonize important federal procedure.

PRAYER.

For the foregoing reasons petitioners pray that a writ of certiorari issue out of this court to the United States Circuit Court of Appeals for the Second Circuit directing said court to certify and send to the court on a date to be determined, a full and complete transcript of the record and of all proceedings there had in this case, to the end that the case may be reviewed and determined by this court, that its judgment and decisions be reversed with proper directions; and that your petitioner be granted such other and further relief as may be proper.

EDWARD M. STEELE and HENRY M. STEELE,
as Executors of the Estate of Emma W. Steele, Gus Stern, Elva Lambertson, First National Bank of Stillwater, Oklahoma, *et al.*,
Petitioners.

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—against—

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction of This Court.

The judgment of the Circuit Court of Appeals was entered December 8, 1947 and the petition for rehearing was denied on December 22, 1947 (R. 188). Jurisdiction of this court is invoked under Judicial Code Section 240 (a), 28 U. S. C. A., Sec. 347 (a) as amended by the Act of February 13, 1925.

Opinions Below.

The opinion of the District Court is not reported (R. 157, 165). The opinion pointed out that the defendant raised the defenses of the six and ten-year Statute of

Limitations and moved for a summary judgment under Rule 56, and to dismiss on jurisdictional grounds under Rule 12(h), and the court concluded that the defense of the ten-year Statute of Limitations was a bar to the action. It held that the fact that the action was commenced within one year from the disposition of the original York suit on jurisdictional grounds did not remove the bar of the Statute of Limitations under Section 23 of the New York code on the ground that the cause of action in this suit was different from the cause of action in the *Hackner* suit which York joined and from which action she was dismissed.

The opinion of the Court of Appeals is not yet reported (R. 173-176). The Court of Appeals went back to its opinion in the *Hackner* case (which it rejected in this suit) (143 F. (2) 503, 528), and stated that the procedure under 23 (a) (3) "is in effect, but a congeries of separate suits" and that "each claim must" meet the jurisdictional requirements and that the District Court improperly decided the "merits" as it had no jurisdiction of "Baseball" because of the absence of "diversity" and of the other petition of the jurisdictional amount. It therefore reversed, without a cross appeal, the judgment on the merits with directions to dismiss the action of the petitioners. It held at first that the fact that respondent did not raise the jurisdictional question in the District Court was irrelevant. It was pointed out in the petition for rehearing that the court was in error when it assumed that the jurisdictional issue was not raised and that it was in fact raised below, and when the court decided on the "merits" it necessarily held that it had jurisdiction and in the absence of an appeal it was *res judicata* and it struck out that part from the opinion (R. 176, note 5). The rehearing however was promptly denied.

A STATEMENT OF THE CASE.

The History.

Grace W. York intervened as a plaintiff in a suit which was commenced by Elias Hackner against the respondent in the year 1940 for a breach of trust and fraud in causing him and other noteholders to accept an "offer" to exchange his gold notes for 50% in cash out of "assigned securities" and 50% in stock which was known to the respondent to have been worthless. York as the owner of $6000 of the notes was a "non-acceptor" of the "offer" and her loss included the 50% in cash of the "assigned securities" in which she did not participate. The offer was made on October 29, 1931 and the suit was filed within the ten-year statutory period (R. 17). She was dismissed as a plaintiff on jurisdictional grounds. (*Hackner* v. *Guaranty Trust Co.*, 117 F. (2) 95) and certiorari was denied here on April 7, 1941 (313 U. S. 559) and pursuant to Section 23 of the New York Code she filed this action on January 22, 1942 (R. 1). A summary judgment was entered against her which was reversed on appeal (143 F. (2) 503). Certeriori was allowed (323 U. S. 693) upon a question which was then academic, and which did not affect the reversal order, on the question whether if and when the Statute of Limitations be pleaded whether a Federal Court in a diversity case is bound by the State Statute of Limitations when it would be inherently inequitable to permit the bar. The Court of Appeals held in the negative and on this point its decision was reversed here (326 U. S. 999). The decision of this court did not affect the reversal order, and upon the filing of the mandate leave was obtained to file an amended complaint joining the petitioners as additional plaintiffs (R. 2). The amended

complaint was filed on January 18, 1946 (R. 3-19). The defendant filed its answer on February 1, 1946 (R. 2) which included the defenses of the six-year Statute and the ten-year Statute of Limitations (R. 51). It moved for another summary judgment on August 20, 1946 (R. 83) and also moved to dismiss the action as to petitioners on jurisdictional grounds (R. 84). On March 28, 1947 the District Court rendered its opinion sustaining the bar of the action by the ten-year Statute of Limitations (R. 157-165). It entered judgment on April 14, 1947 (R. 165-166).

The Facts.

The Guaranty Company of New York, a wholly owned subsidiary of respondent, participated in a syndicate to sell the $30,000,000 note issue of the Van Sweringen Corporation, dated May 1, 1930. The notes bore interest at 6% per annum, payable semi-annually and matured May 1, 1935, and respondent is the Trustee under the Indenture dated May 1, 1930 (R. 92). The corporation agreed to acquire and maintain, free from any lien, incumbrance or pledge, 500,000 shares of the Allegheny Corporation or other marketable securities of equal value as "segregated assets" until at least $15,000,000 of the notes were canceled. Its principal officers, the Van Sweringens, guaranteed to maintain the "segregated assets" in "liquid" condition and to make good any deficiency within 20 days by supplying additional collateral called "assigned securities" of "a current market value of $15,000,000" (R. 93). The defendant was vested with the exclusive power to enforce the terms of the agreement, and the corporation agreed to hold the "segregated assets" for the "exclusive" benefit of the noteholders (R. 30).

The 1930 Crisis:

On October 30, 1930, one day prior to the "due" date of the first semi-annual interest on the $30,000,000 note issue, there was a crisis. No funds were available to pay the interest maturing November 1, 1930. There was "a threatened breakdown" of the covenants to maintain "segregated assets" and "assigned securities". The defendant was informed that on account of a declining market, the Van Sweringens were unable to comply with their agreement concerning the "assigned securities", unless the bankers were willing to extend further credit. It agreed to participate to the extent of $11,000,000 with a group of bankers headed by "Morgan" in loans aggregating $39,500,000 to save the note issue from default. The loan was divided into two parts, one of $16,000,000 to the Vaness Company, the top holding Company and "parent" of the Van Sweringen Corporation; the other, in the amount of $23,500,000, to the Cleveland Terminals Company, the Subsidiary of the Van Sweringen Corporation. All of the common stock of the corporation and other securities were pledged under two collateral notes with "Morgan" for the benefit of the defendant and the other bankers. Some of the proceeds of the loans were used to supply "assigned securities" to substitute $15,000,000 cash and other securities for the "segregated assets" then consisting of the Allegheny stock, and thereby the crisis was overcome. The "Trustee" became a "creditor" to the extent of its $11,000,000 share in the $23,500,000 note of the subsidiary of which the Van Sweringen Corporation was also a creditor in excess of $27,000,000. The defendant came to the "rescue" of the Van Sweringen Corporation because the "Guaranty Company", its subsidiary participated in the Syndicate to sell the $30,000,000 notes to the public (R. 94-97).

The 1931 Crisis:

The crisis reoccurred the following year, when another installment of interest was to mature on November 1, 1931. Again no funds were available to pay interest on the $30,000,000 note issue. There were no prospects that the defendant and the other bankers would themselves receive interest on the $39,500,000 loan which matured on November 1, 1931. Failure to pay interest on these loans would have brought the collapse of the entire Van Sweringen "empire". This would have affected the reputation of the "Guaranty Company" which sold the $30,000,000 note issue to the public and the $11,000,000 debt created a year prior (R. 97-98).

Trustee's Position:

Upon default in the interest payment on November 1, 1931, the Trustee could have accelerated the note issue, could have taken action to appropriate the "segregated assets" toward the partial satisfaction of the debt, could have obtained a deficiency for the balance, and it could have resorted to the satisfaction of the deficiency from the other assets of the Subsidiary which was indebted to its parent in the sum of $27,000,000. Such a procedure would have clashed with its interests as a "creditor" of the Subsidiary on the $23,500,000 note.

The defendant considered the problems, which included the possibility of insolvency proceedings against the Van Sweringens, the Vaness, and its Subsidiary, the Cleveland Terminals Building Corporation. Such proceedings would have imperiled its interest and the interests of other bankers as affecting the collateral held under the $39,500,000 notes. Therefore, the defendant and the other bankers, together with the Van Sweringens, worked out

"general terms" of the proposed plan to the noteholders whereby the default would be avoided and the insolvency proceedings would be prevented (R. 98-99).

The Scheme:

To prevent insolvency it was necessary to eliminate the creditors. To prevent the default it was necessary to use the "assigned securities" which could have only been done by a cancellation of half of the $30,000,000 note issue. To accomplish such results, the defendant actively participated in a plan whereby the corporation would "offer" to purchase the notes by paying 50% in cash and to exchange the other 50% of the notes for the common stock. This common stock was in the possession of the defendant and Morgan, as collateral, and in order to make the exchange the common stock had to be released. It was arranged that upon the purchase of the notes, 50% would be canceled and the other 50% would remain uncanceled and be substituted for the common stock. Thereby the defendant and the other bankers would obtain 50% of the notes in exchange for the common stock as collateral, and the "segregated assets" would be "released" and used as collateral. This plan which was worked out by the defendant, was incorporated in a written agreement between the Van Sweringens and "Morgan". The defendant and "Morgan" would become the only creditors of the corporation under the scheme so that no one could interfere with the recovery of the claim due from the Subsidiary in excess of $27,000,000, which claim on the deficiency would have "ranked equally" with the claim of the defendant on the collateral note of the Subsidiary. These matters were considered by the defendant when it "consented" that the "offer" be submitted (R. 99-101).

The Offer:

It was "against this background" that the defendant made the "offer" in the name of the Van Sweringen Corporation to purchase 50% of the notes for fifty cents on the dollar, payable from the "segregated assets", and to exchange the other 50% of the notes for its common stock. There was outstanding $26,234,000 in notes, besides $3,766,000 in notes held in the treasury and acquired with the funds from the "segregated assets". There was $13,440,681.86 in the "segregated assets", and only $13,117,000 were required to pay 50% on the outstanding notes. There was therefore an "excess" of $337,-681.86 which was available to the defendant and Morgan under the arrangement. The "offer" stated (R. 40) that the "Van Sweringen interests" would acquire the notes and they would be free to use the balance of the "segregated assets" for their purpose. It did not state that the defendant and the other bankers would receive the freed assets and that they would obtain the uncancelled notes and substitute them in their portfolio in exchange for the common stock, nor did it disclose that the corporation was then insolvent. It did not disclose that after the release of the "segregated assets" they would be used on the collateral note of $23,500,000 which Morgan held for its own use and benefit and for the benefit of the defendant. In reality the defendant printed, mailed, telephoned and had its "key" offices work on this offer a day before it was announced, and used its entire organization to have the offer transmitted and accepted and advanced the sum of $7500 in order to accomplish its object (R. 67-69).

Personal Benefit:

On November 14, 1931, 50% of the notes were acquired with the proceeds of the "segregated assets" and retired. Thereby, Vaness, the top holding Company with-

drew the balance of the "assigned securities" which at that time consisted of $3,482,877 in cash and $4,000,000 in Government securities. These funds were "withdrawn" and turned over to "Morgan" under the terms of the written agreement of October 21, 1931 whereby it applied such funds towards the $39,500,000 loans in which the defendant was personally interested to the extent of $11,000,000. Morgan also acquired for its own benefit and for the benefit of the defendant $13,784,000 of the uncanceled notes which were purchased with the funds derived from the "segregated assets" (R. 102-105).

Loss to the Investors:

Holders of $1,213,000 of the notes did not accept the offer. There was at least available for these noteholders $606,500 out of the "segregated assets". These funds were "released" or "withdrawn" by the foregoing scheme, and were turned over to the defendant and other banking groups and applied under the agreement of October 29, 1931. These $1,213,000 notes are in default since November 1, 1932, and the Company is wholly insolvent (R. 105).

I.

The defendant which obtained a decree sustaining its plea of confession and avoidance, and which did not appeal from the decision which overruled its motion for summary judgment on jurisdictional grounds, was in no position to raise the issue of jurisdiction on the appeal taken by the plaintiffs.

Respondent moved: (1) for a summary judgment under Rule 56 on the ground: (a) of the bar of the *six* year statute, and (b) the bar of the *ten* year statute, and it also moved (2) to dismiss the action under Rule

12 (h) on *jurisdictional* grounds. The summary judgment was entered under Rule 56, *overruling* the plea of the *six* year statute of limitations and *sustaining* the plea of the bar by reason of the *ten* year statute of limitations (R. 165, 166), and the action was *not dismissed* under Rule 12 (h). When the court *sustained the plea of the bar of the ten year statute of limitations,* it necessarily *overruled* the motion to dismiss on jurisdictional grounds under Rule 12 (h), because a decision based on the bar of the statute must be founded on the existence of the jurisdiction. A decree on the merits of the plea of "confession and avoidance" is a decision that the jurisdiction existed (*Grand Rapids Electrotype Co.* v. *Powers-Tyson Corp.,* 356 Mich. 311, 313, *certiorari* denied 286 U. S. 545; *Ostrander Seymour Co.* v. *Grand Rapids Fur. Co.,* 50 F. (2d) 567; *Topping* v. *Fry,* 147 F. (2d) 715, 717).

The defendant who sustained its defense of the bar of the action by reason of the ten year statute of limitations, may urge every reason available to it in *support* of the judgment, and if the judgment of the court is based on an erroneous reason, the defendant may in support of the judgment supply any other reason. This, however, must be done in *support* of the judgment. It may not supply reasons which tend to *reverse* the judgment and obtain a different judgment inconsistent with the one which was entered and from which it did not appeal, and the judgment is *res adjudicata* upon it.

In *Morley* v. *Maryland Casualty Co.,* 300 U. S. 185, the Supreme Court said, at page 191:

> "Without a cross-appeal, an appellee 'may urge in support of a decree any matter appearing in the record.' * * * What he may *not do* in the absence of a cross appeal is to 'attack the decree with a view either to *enlarging* his own rights thereunder or of *lessening* the right of his adversary.' * * * The rule is inveterate and certain." (Emphasis ours).

A wealth of authorities are there cited.

In *Cochran* v. *M & M Transportation Co.*, 110 F. (2d), 519, the Court said, at page 523:

> "The situation is different where a judgment grants a litigant only part of the relief sought, and denies the rest. In such a case the party is aggrieved in part by the judgment and may appeal or cross appeal. If he fails to do so he can be heard only in support of the judgment as rendered; such judgment becomes *res judicata* as to the issues decided against him."

The Court cited many decisions which sustain its view. The same views were expressed in *Arkansas Fuel Oil Co.* v. *Leisk,* 133 F. (2d) 79, 81. Many decisions are cited in Note 7.

The court held in its opinion (R. 174) that the dismissal was on the "merits". This constituted an adjudication on the jurisdictional question in *favor* of the jurisdiction, and in the absence of an appeal the issue was not open for review.

This was not a case where the issue of jurisdiction was not raised below, as first stated in the opinion. Here, it *was expressly raised* (R. 84). In deciding on the *merits* the court necessarily overruled the defense of lack of jurisdiction and no *appeal* was taken by the defendant. This constitutes *res judicata.*

In *Stoll* v. *Gottlieb,* 305 U. S. 105, *supra,* the court applied the rule not only to jurisdiction of the *person* but also to the *subject matter,* saying (p. 174):

> "A few years later this Court had occasion to examine again the question of the effect of a former adjudication by a United States Circuit Court in a case where this court assumed the Circuit Court had jurisdiction of the parties but not of the subject matter. The earlier adjudication was pleaded in bar to a suit to quiet title in a state court sitting in the

same state as the Circuit Court. The state courts denied effect to the Circuit Court decree. On writ of error to the Supreme Court of Oregon this Court answered the contention that the ground upon which the Federal court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States" in these words:

" 'But that was a question which the Circuit Court of the United States was competent to determine in the first instance. *Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*"

This court further said (p. 176):

"It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. Examples with citations are listed in *Noble* v. *Union River Logging R. Co.* For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are *quasi-jurisdictional* facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as *we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined* adversely to the respondent. That determination is *res adjudicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional."

In *Heiser* v. *Woodruff*, 327 U. S. 726 the court said (p. 732):

> "But we are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res adjudicata*, which is founded upon the generally recognized public policy that there must be some end to litigation and that *when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court. Baldwin* v. *Traveling Men's Assn.*, 283 U. S. 522, 525-6."

After citing *Stoll* v. *Gottlieb, supra*, the court said, (p. 736):

> "*Pepper* v. *Litton, supra*, lends no support to a different view. Undoubtedly, since the Bankruptcy Act authorizes a proof of claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of *want of jurisdiction* of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by fraud of a party. *Pepper* v. *Litton, supra*, 306; *Chandler* v. *Thompson*, 120 F. 940; *In re Continental Engine Co.*, 234 F. 58; *In re Stucky Trucking & Rigging Co.*, 243 F. 287; *In re Rubin*, 24 F. 289. *But it is quite another matter to say that the bankruptcy court may reexamine the issues determined by the judgment itself.* It has, from an early date, been held to the contrary" (Emphasis ours).

The decision of this court was called to the attention of the Court of Appeals in the original reply brief as well as in the petition for rehearing (R. 181). The court, however, dismissed the rehearing on the day the petition was filed without comment.

II.

The decision of the Second Circuit Court of Appeals that in a spurious class suit where the original suit is based on diversity of citizenship and the claim is in excess of $3,000 the court is without jurisdiction to permit intervention of claimants not having the jurisdictional amount under Rule 23 (a) (3) and 24 (b) is in conflict with the decision of the Third Circuit Court of Appeals.

Even if this were a suit for "individual" fraud as the one involved in the *Hackner* suit which was distinguished on the prior appeal from the suit which involved a "common breach of trust" and where the fraud was "not individualized" (143 F. (2) 503) the decision that other noteholders who lacked the requisite amount were improperly intervened is not only contrary to its own decision in the instant case (143 F. (2) 503) but is contrary to the decision of the Third Circuit Court of Appeals.

In *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 E. Supp. 870, p. 872, the Court discussed the following:

> "There are two questions involved:
>
> 1. Where a class action has been filed, in which jurisdiction in the original proceeding is based on diversity of citizenship and the amount involved is in excess of $3,000, does the Court have jurisdiction to permit the intervention of other claimants in the class as new plaintiffs under the provisions of Rules 23(a) Paragraph (3) and 24(b) of the Federal Rules of Civil Procedure, although there is no diversity of citizenship between the intervenors and the defendant, and the intervenors' claims are less than $3,000 in each instance?
>
> 2. In a class action brought on a contract entered into between the bargaining representative of the class and a railroad, may other members of the

class not possessing both of the jurisdictional requirements of diversity of citizenship and a claim in excess of $3,000 exclusive of interest and costs intervene on the ground that the Railway Labor Act, regulating interstate commerce, is involved?

After referring to an earlier decision where the Court answered the questions in the *negative,* and in concluding that *it erred,* the Court said (p. 874):

> "In reaching the conclusion that intervention of the 58 additional plaintiffs should not be granted on the basis of Rule 23(a) (3) or Rule 24(b) of the Federal Rules of Civil Procedure, *I do not believe that proper consideration was given the law in the Third Judicial Circuit.* I am, therefore, approaching the problem *de novo,* so to speak, or considering the same in the nature of a petition for rehearing.
>
> It appears that the correct conclusion to be reached depends on the type of class action which is involved in the proceeding now before this Court. There has been considerable trouble and difficulty experienced by the courts in determining under a given set of facts whether an action filed by a group of plaintiffs is a true class suit, a hybrid class suit or a spurious class suit."

The Court further said:

> "Our Circuit Court has said 'We have struggled with these distinctions on previous occasions.' *Pentland et al.,* v. *Dravo Corp.,* 3 Cir. 152 F. 2d 851, 852; *Pennsylvania Co. et al.* v. *Decker,* 3 Cir. 123 F. 2d 979.

The Court thereafter discussed the various types of Class Suits: (a) Hybrid Class, and (b) Spurious Class, and in holding that in the latter class *parties that do not have the jurisdictional amount may join with one of the parties who has the jurisdictional amount,* and that this was the rule of the Third Circuit, the Court said, p. 874:

"A permission joinder device. The presence of numerous persons interested in a common question of law or fact warrants its use by persons desiring to clear up a litigious situation. The example is given of a fire negligently started by a railroad which inflicts widespread damage upon many property owners. Their only common interest is to get money from the tort-feasor. The tort-feasor's obligation certainly is a separate matter as to each plaintiff. But if the lawsuit does not grow too bulky, there may be economy of time and effort hearing all the claims in the same proceeding. *In a spurious class action each of the original plaintiffs* must have a diversity of citizenship with the defendant, since only *jurisdiction was founded in the original plaintiffs,* others who have a common question of law or fact may be allowed to intervene to clean up a litigious situation. Any judgment rendered would bind the original plaintiffs, all who had intervened, and the defendant, but would not bind others beyond the principle of *stare decisis.* Moore's Federal Practice, Vol. 2, pp. 2241 to 2245, inclusive; *Pentland et al.* v. *Dravo Corp.,* 3 Cir. 152 F. 2d 851; *Pennsylvania Co. et al.* v. *Deckert,* 3 Cir. 123 F. 2d 979."

In order to settle the important question upon which the General Circuits are not in accord the writ should be issued.

III.

The rule in the Second Circuit that where a class action was commenced by one who is a non-resident in a diversity case that the court is without jurisdiction to permit the intervention of a resident claimant under Rules 23 (a) (3) and 24 (b) is in conflict with decisions of other courts and the writ should be issued to harmonize the decisions.

The opinion deciding the dismissal of "Baseball" on the ground that it was not a non-resident, is squarely in conflict with the decision of the Third Circuit as

pointed out in *Shipley* v. *Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870, 872 *supra* and with the authorities cited there (*Portland et al.* v. *Drover Corp.*, 152 F. (2) 851; *Penn. Co.* v. *Deket*, 123 F. (2) 979). The writ would be granted in order to harmonize the conflicting views.

IV.

The District Court clearly erred when it held that the action was barred by the Ten Year Statute of Limitations.

Respondent pleaded the six and ten year Statutes of Limitations. The District Court held that the six year Statute was inapplicable but that the ten year Statute applied as this was strictly a suit in equity (R. 162). The Court also held that (R. 164) the "cause of action occurred in December, 1931", and that this suit was not filed until January 20, 1942 and was therefore barred. It clearly erred when it determined that the cause of action occurred in December, 1931 and it was its duty to hold that the cause of action did not occur until November 1, 1932 and that the suit was filed within the ten year statute.

(a) The ten year statute did not begin to run until the default on November 1, 1932, and the suit was filed within the ten year period.

It was alleged in the amended complaint (R. 4) that the default on plaintiff's bonds occurred on November 1, 1932. This was admitted by the defendant (R. 119). Prior to the default, no cause of action was available to any of the noteholders who did not accept the terms of the offer. It is true that the defendant obtained the "assigned securities" in December, 1931; however, *it continued to pay interest to the non-acceptors until No-*

vember 1, 1932 (R. 119). *No action was therefore available to such noteholders until the default day, November* 1, 1932 (*Bay Ridge Savings Bank* v. *Gussow*, 68 N. Y. S. (2) 662, 623) and the ten year statute did *not* expire until November 1, 1942 and this action was filed January 20, 1942. The "accrual of a cause of action means the right to maintain and institute a suit" and for the purposes of the Statute of Limitations "the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief" (*Bond* v. *Marat*, 145 Neb. 780, 785; *Allen* v. *Payson*, 11 N. Y. S. (2) 28, 32). The cause of action did not occur until the debt or the interest was due on November 1, 1932 (*Southern Surety Co.* v. *Austin*, 22 F. (2) 881, 882). This is the law of New York (*Nagle* v. *Harold*, 30 F. Supp. 905, 907) and the law of New York is controlling on this question (*Reed Co.* v. *International Container Corp.*, 43 F. Supp. 644, 645).

(b) This suit was properly brought under Section 23 of the Civil Practice Act as construed by the Court of Appeals of New York and the action was not barred.

After determining that the ten year Statute of Limitations applied and erroneously concluding that it expired in December, 1941, instead of November, 1942, the trial court said (R. 162):

> "But, says the plaintiff, § 23 of the New York Civil Practice Act has extended the plaintiff's time to sue one further year. That section reads:
>
> ' § 23. *Effect of reversal of judgment or termination of action.* If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal

> of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representative, may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination. This section also applies to the workmen's compensation law."

After reviewing the previous litigation leading up to the dismissal of York as a party in the Hackner litigation, the District Court said (R. 163):

> "The order and judgment on that mandate was filed on April 30, 1941. *Hackner* v. *Guaranty Trust Co.*, 117 F. (2) 95, cert. denied April 7, 1941, 313 U. S. 559, Judge Clark in his opinion affirming that dismissal, said that the court had no jurisdiction because the amount in controversy as to each plaintiff, except Eastman, was $3,000 or less. The claim there asserted was for misrepresentation whereby each of the plaintiffs was induced to make a sale of his or her notes for less than their true value. A motion for summary judgment was later made against the plaintiff Eastman and granted on March 23, 1942. That judgment was affirmed on August 4, 1942, 130 F. (2) 300, and certiorari was denied, 317 U. S. 691."

The Court further said (R. 164):

> "It is to be noted that, with some limitation not important here, § 23 permits the commencement of a new action 'for the same cause' within one year after the termination of a previous action. Here, the present claim is clearly not for the same as that stated in the *Hackner* suit. The opinion of the Circuit Court of Appeals in this case, which I am directed to follow, expressly so holds. Judge Frank wrote, 'That decision on the pleadings in such an action (the *Hackner* case) was not an adjudication that, in a suit based on a different theory—*i. e.*, the defendant's breach of its fiduciary obligations in not causing the debtor's liquidation—her claim was not

> for the requisite amount.' 143 F. (2) at page 519. And there can be no doubt that that is true. The *Hackner* case was brought by noteholders who had accepted the offer. This action was clearly based on fraud, there having been in the complaint charges of misrepresentation. Here the claim is based on a breach of trust. There it was held there was no trust *res;* here the contrary is determined. Under such circumstances, the one year extension would not apply. *Harris* v. *Tams,* 258 N. Y. 229; *Goldstein* v. *Tri-Continental Corp.,* 282 N. Y. 21, 30."

The Court concluded (R. 164):

> "Under the last two cited cases, the time when the plaintiff asserts her new claim will determine whether or not the statute of limitations applies. Here the cause of action accrued in December 1931, and this suit was not begun until January 20, 1942. It is, therefore, barred by the ten year statute."

Even if it be conceded *arguendo* that the original suit of York was for fraud and not for a breach of trust, and that the present suit is for a breach of trust, the *narrow construction* placed on the statute by the District Judge *is squarely contrary* to the decision of the Court of Appeals of New York in *Titus* v. *Poole,* 145 N. Y. 414. There, a cause of action was asserted for *fraud* and after the dismissal of the cause of action, a new suit was filed based on the same state of facts but on a *warranty.* It was contended as here that the second suit was not for the same cause of action. In holding against the contention, the court of appeals said (p. 422):

> "The first action was terminated by non-suit, was not voluntarily discontinued, was not dismissed for neglect of prosecution, nor was there any final judgment therein on the merits, and the present action was brought within a year after the termination of the former action. The second action also was an action for the same cause as the first action, within the meaning of section 405. According to the nomen-

clature of actions the first was an action for fraud and the second on warranty—one *ex delicto* and the other *ex contractu.* It is often important to observe the distinction. *But the same facts may often give a plaintiff the right to bring the one action or the other at his election* and when dealing with remedies with a view to determine whether remedies applicable to actions of the one kind or the other are to be administered, it is common and proper to speak of the two remedies as based upon distinct and different causes of action, although the right in both cases is founded upon the same transaction. *But it cannot be supposed that the words 'same cause' in section* 405 *were intended to have this narrow meaning.* Such a construction of a beneficial provision, intended to preserve and continue the rights of parties, would be very inconvenient, and would often defeat the purpose of the statute. *The words were intended, we think, to remove the disability whereever a new suit was brought within the year, based upon the same transaction as the former one, without regard to its technical form,* and was intended in part to prevent mere mistakes as to the form of the remedy from concluding the party from subsequently pursuing his real right under a more appropriate form of action." (Emphasis ours.)

The tendency of the New York courts to construe *liberally* Section 23 of the Civil Practice Act appears from the decision in *Gaines* v. *City of New York,* 215 N.Y. 533, where the court said (p. 539):

"The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits * * * the important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts * * * A suitor who invokes in good faith the aid of a court of justice, and who initiates a proceeding by the

> service of process, must be held to have commenced an action within the meaning of this statute, though he has mistaken his forum."

In holding in that case that the dismissal on the jurisdictional ground entitled the plaintiff to commence a new action under Section 23, the court further said:

> "The conclusion to which we are thus led has support in many well considered cases. It is the rule in most of the state courts * * * in all these cases the statute was held suspended though the earlier action was dismissed for lack of jurisdiction either of the subject matter or of the person. It is the rule adopted by the judges of high authority in federal courts."

(1) The dismissal was not on the merits and it was proper to file the suit under Section 23 of the New York Civil Practice Act.

The liberal construction of Section 23 of the New York Civil Practice Act was adopted in *Buchholz* v. *United States Fire Insurance Co.*, 269 App. Div. 49, 53 NYS (2) 608, where the court said (p. 610):

> "We find that section 23, Civil Practice Act, applies and that the present suit was timely. It is for the same cause, in that it is to enforce the same loss on the same policy as in the first action, but after fulfillment of the conditions precedent. The one year provision contained in section 23 begins to run from the termination of the first suit. Here the termination was the decision of the Court of Appeals (or entry of judgment on *remittitur*) in the earlier action. *Wooster* v. *Forty-Second St. & G. St. Ferry R. Co.*, 71 N. Y. 471; *Richard* v. *Anderson Union Bank*, 225 App. Div. 634, 234 NYS 177, affirmed 253 NY 166, 170 N.E. 532, 69 A.L.R. 667."

The court further said:

> "The prior action terminated in a judgment which was a final determination 'upon the merits' within section 482 Civil Practice Act, in that it would affect an estoppel to the extent that no other action could be maintained on the same facts, *i. e.*, without a prior appraisal. But the term 'merits' as used in section 23 *has a broader connotation* than it has as used in section 482, Civil Practice Act. Section 23, in effect, contemplates *that a suitor have one adjudication of the substance or merit of his cause where he has initiated a suit in time.*" (Emphasis ours.)

York was dismissed as a party plaintiff for misjoinder and for lack of the jurisdictional amount (*Hackner* v. *Morgan et al.*, 117 F. (2) 95), and the action was properly filed (*Friedman* v. *Long Island R. Co.*, 65 N.Y.S. (2) 899, 901). The court did not hold in the *Hackner* case that her suit was not for a breach of trust, nor was it held there that there was no trust and no *res*. The decision that there was no trust and no *res* was first made by Judge Bright in the *Eastman* case, to which York was *not* a party (43 Fed. Supp. 637). This court affirmed that decision (130 F. (2) 300) which was *not* an adjudication on the cause of action of York, to which action she was *not* a party. In the *York* case, this court held that there *was a trust* and there was a *res* (143 F. (2) 503, 512). Her cause of action was, therefore, the *same*, and the merits were *not* determined when she was dismissed as a party on jurisdictional grounds.

The respondent who urged on the prior appeal that "in the *Eastman* case the plaintiff asked the court to find such a breach of trust and hold Guaranty Trust Company liable for damages caused to the noteholders as a result thereof" is, of course, not in position to take an inconsistent position even if York were a party to the *Eastman* suit. However, she having commenced her

suit under the same instrument which was first construed by this court not to have constituted a trust, and later changing its views to the effect that it was a trust, does not prevent her from maintaining a new action based on the same notes which are secured by the same Trust Instrument. In the original opinion of the court which was then unanimous, it said (p. 1090):

> "Plaintiff alleges in her complaint that she did not learn of the trustee's participation in the offer plan until 'the middle of 1940' when she joined in the *Hackner* v. *Morgan* action. She was dismissed as plaintiff from that action by this court in 117 F. (2) 95, and that action terminated as to her on April 7, 1941, when certiorari was denied, 311 U. S. 559. She began the present suit on January 22, 1942. On the facts as they appear on the record before us, the suit was timely begun."

The striking out of this part from the opinion did not change the facts.

(2) The cause of action in this case is identical with the cause of action which was asserted by York when she intervened in the Hackner suit.

The determination of the District Court that the action was barred because Section 23 of the New York Civil Practice Act permits the commencement of a new action "for the same cause" within one year after determination and *that here the suit of York is not for the same cause* as stated in the *Hackner* suit, *is clearly unsound.* Whether or not York sued for the same cause of action must be determined from the allegations in the *Hackner* complaint insofar as they applied to her. While Hackner and the others who accepted the exchange sued for loss which they sustained by reason of the exchange, York, who did *not* exchange, *sued for a different cause of action.* She intervened in the *Hackner* suit by an amendment which alleged that she owned $6,000 of the notes described in the complaint and that she "never exchanged her

notes for the stock but was still the owner of the notes and has not received anything in payment of principal and interest since November 1, 1931" (R. 36, in *Hackner* case). The complaint in the *Hackner* suit, insofar as it was applicable to her, alleged (¶ 8) that in order to prevent the acceleration of the notes and the application of the "assigned securities" in payment of the $30,000,000 notes and to maintain the note issue in good standing so that no action could be taken by the note holders, the defendants, including the Guaranty Trust Company, secretly entered into an agreement to make the offer of exchange and that the Guaranty Trust Company, together with Morgan, used the segregated assets and assigned securities in order to acquire $11,227,000 of the notes. It was alleged (¶ 12) that if the real information had been disclosed the note holders would have received in excess of $13,000,000 to apply on the $26,000,000 indebtedness and that they would have participated in all other assets of the company to satisfy any deficiency. It prayed among other relief that Morgan and the Guaranty Trust Company "be required to account for all funds and properties received by them as a result of the exchange of the Gold notes for the common stock, or in the alternative, that they be held jointly and severally liable for the damage caused to the note holders" and it asked that the Guaranty Trust Company of New York, as Trustee, be decreed to be *"liable for its breach of trust duty"* to protect the noteholders.

In disposing of the *Hackner* case, the court said (117 F. (2) 95):

> "The proffered amendment added one plaintiff, York, who has never transferred her bonds; seemingly, therefore, she sustained no damage, but at any event, the possible loss of 50 per cent of her investment of $6,000 would be just under the requirred

amount. As to York, there cannot exist jurisdiction any more than as to the original plaintiffs, and it cannot be supplied for her or for them by adding a plaintiff who can show jurisdiction. *Rich* v. *Lambert*, 12 How. (53 U. S.) 347; *Stewart* v. *Dunham*, 115 U. S. 61; *Gibson* v. *Shufeldt*, 122 U. S. 27; *Clark* v. *Paul Gray, Inc., supra*, 306 U. S. at 590."

The brief of the defendant filed in this cause best serves to illustrate the fallacy of the statement in the opinion of Judge Bright that the two causes are different. It urged here (p. 12):

"In both cases it is charged that by means of the agreement of October 29, 1931 and the exchange offer a default in the payment of the November 1, 1931 interest, which the Van Sweringen Corporation would have been unable to pay, was avoided, thereby preventing an acceleration of the note issue which the trustee or 25% of the noteholders could have insisted upon under the terms of the indenture; that if there had been such a default and resulting acceleration the noteholders would have received 50 cents on the dollar on their notes out of the segregated assets and assigned securities, then held for their protection, and also would have been able to apply all the other available assets of the Van Sweringen Corporation toward any deficiency."

Defendant also urged:

"In both suits it is further claimed that after $15,000,000 of the notes had been retired under the offer through the use of a portion of the segregated assets and assigned securities, the defendants were enabled by the agreement of October 29, 1931 and the exchange offer, to, and did actually appropriate the remainder of the assigned securities and the available assets of Van Sweringen Corporation to their own purposes as creditors, to the detriment of the noteholders, and in addition obtained the notes exchanged under the offer, which were not cancelled, in place of worthless common stock of Van Sweringen Corporation."

It said:

> "In the *Hackner* complaint and also in the present complaint, *this is charged as a breach of trust* on the part of Guaranty Trust Company as trustee. *In each case the plaintiff asks the court to find such a breach of trust and hold Guaranty Trust Company liable* for the damages caused the noteholders as the result thereof (R. 9; Tr. 12)." (Emphasis ours.)

The statement in the opinion of Judge Bright (R. 164), in contrasting the two actions, that: "There it was held there was no trust *res;* here the contrary is determined" is *fundamentally erroneous* for the reason that the trust instrument and *res* are the *same* in both cases. It was Judge Bright who determined that the trust instrument was a "peculiar" document but *not* a trust (43 F. Supp. 637), which the court affirmed (130 F. (2) 302). However, it *reversed* itself in this case (143 F. (2) 503) and held that *it was a trust.* It was the *same trust instrument* upon which the cause of action was asserted in both cases. When the court concluded (143 F. (2) 503, 512) that there was a *res* and (p. 518) that the document was a *trust* and, even if the statement in former appeal were the "law of the case", it "would not be obliged to stand by it when convinced of their error", *it did not speak of a different trust agreement* but of the *same instrument.* The statement of Judge Bright that in the former suit of York there was *"no trust res"* and in this suit "the contrary is determined" that it is a trust and a *res* is therefore *clearly unsound.*

The fact that in the *Hackner* suit to which York was *misjoined* as a party the court *erroneously* held that there was no *res* and no *trust,* does not affect *her right* to assert a cause of action on the basis of her claim which was always consistent that there was a *trust* and a *res.*

(c) The statute did not begin to run against the existing trust until the repudiation of the trust by the defendant.

The court having determined that there was a *res* and an *express trust* on the main appeal, it follows that the statute did not commence to run until the termination of the trust and the time when the defendant began to repudiate his obligation (*Devoe* v. *Lutz*, 133 App. 356, 359; *Miller* v. *Guaranty Trust Co.*, 67 N.Y.S. (2) 76, 77; *Manufacturers Trust Co.* v. *Kelby*, 125 F. (2) 652, 665). The statute operates as a bar from the time the trustee notifies the *cestui* of its treachery" (4 Bogert on Trusts and Trustees, sec. 951). In the instant case the defendant *continued its treachery* when it paid the interest up to November 1, 1932 and *concealed* from the noteholders that there was in fact no money available for them and that the Van Sweringens advanced the money (R. 109). The trial court *failed to follow the opinion of the court* on this point (143 F. (2) 525, 524, note 41).

(d) The denial of the benefit of the Statute of Limitations when it is inequitable is within the power of a Court of Equity even under the New York law.

This Court did *not* adjudicate that under the New York law a court of equity may not deny to a defendant the benefits of the statute when it is inherently inequitable, and merely held that the New York law controls. The New York Courts themselves have recognized the rule of the Federal Courts that *equity may deny the benefits of the Statute* when it would be *inherently inequitable* to permit its defense, and this court held that it would be inherently inequitable to sustain the bar of the statute.

In *Dodds* v. *McColgan*, 229 App. Div. 273 (1930) the court said (p. 277):

> "The *denial* to the defendant of the *benefit* of the Statute of Limitations is *within the power of a Court of Equity.* As stated by the Court in *Clarke* v. *Gilmore,* (149 App. Div. 445, 450): 'Where one has obtained an advantage by fraud, equity will not permit him to hold it by resorting to the Statute of Limitations.' The conclusion there reached is in accordance with the judgment for plaintiff in *Lightfoot* v. *Davis,* (198 N.Y. 261), where *though an action of conversion was barred by the Statute of Limitations, the Court allowed recovery* in equity for bonds stolen many years before by defendant's testator, who had fraudulently concealed his possession of them, until the Statute had run. Like relief has been granted in cases nearly parallel *where equity has prevented the Statute becoming an instrument in aid of fraud.*" (Emphasis ours.)

The Court cited as authority the decision in *Bailey* v. *Glover,* 88 U. S. 342, which is the leading case on the right of a Federal Equity Court to disregard the Statute of Limitations when inherently inequitable.

This case is cited with approval by the Appellate Division in *Application of Assesso,* 69 N. Y. S. (2) 702, where the court said (p. 706):

> "It is an affirmative defense and equity, in proper case, may enjoin or deny the right to enforce it. *Dodds* v. *McColgan,* 229 App. Div. 273, 277; 241 N. Y. S. 584, 587. If interposed it may be met with proof not here shown sufficient to toll or overcome it."

The dismissal of the cause of action because of the bar of the Statute cannot be sustained on the theory that equity must enforce a Statute of Limitations when it is inherently inequitable as was held by this court.

(e) The action was based on actual fraud and the bar of the statute did not commence until its discovery.

In *Teich* v. *Lawrence,* 265 App. Div. 970, 975, the court applied the statutory provision to an equitable proceeding on facts almost identical as here. The decision was reversed (291 N. Y. 24) but not on the ground that it was not an action for "fraud", but on the ground that the action was "derivative" in the name of the corporation and no fraud was alleged against it. Here, the action was *not* derivative and it was founded on fraud. The rule that the bar of the statute does not commence until the discovery of the fraud was applied to "fraud" in the equitable sense in *Wechsler* v. *Bowman,* 285 N. Y. 284, 294 and *In Re Carpenter's Mill,* 40 N.Y.S. (2) 13, 20).

In opposition to defendant's motion for a summary judgment plaintiff filed an affidavit calling attention that the complaint charged "actual fraud". The affidavit referred to the provision of the Trust Agreement which vested the power in the defendant to protect the noteholders in the event of any emergency (R. 109-111). It showed that in addition to "assigned securities" there was an asset consisting of a claim of $27,154,584.03 against the Terminal Company and those who would accept the offer would be eliminated as creditors and would not participate in this asset (R. 115), and that "non-acceptors" would lose everything in the "assigned asset" and the defendant would be a competitor with them as to this asset. The defendant knew that the Vaness Company would be in position to withdraw $7,500,000 from the "assigned securities" and make them available to it and to the other bankers in discharge of the obligations due them to the detriment of the non-acceptors. It knew that the acceptors would receive from the "assigned securities" in

cash 53% and the non-acceptors would receive only 3% (R. 115). The defendants knew (R. 116) that the non-acceptors would not be in position to take any action because of the provision which required 25% of the outstanding notes to demand action from the trustee and that by the scheme there would remain less than 25% who would not accept and the noteholders would be helpless.

Actual fraud was shown in that (R. 116) the defendant actively participated in the submission of the offer, and the defendant "expended $7,562.80" in printing the offer, in making it and "carrying on a campaign to persuade the noteholders to accept the terms of the offer". While the "offer" was made in the name of the corporation "it was actually made by the defendant, but its name and its participation was not disclosed."

The defendant trustee did not furnish to the noteholders any information concerning the foregoing offer (R. 116). It "did not inform them of the conferences which it held, the information which it obtained, the threatened bankruptcy and the attempt to prevent it for the benefit of the defendant and the other bankers". As a result the $606,500 which was available to the $1,213,000 outstanding notes of the noteholders who did not accept the offer was used by the defendant for its own benefit and the benefit of the other bankers (R. 117) under the secret agreement of October 29, 1931. Because of its "adverse" position the defendant "actively participated" in the "offer" whereby the "assigned securities" were taken away from the non-acceptors and "were appropriated for its personal use" (R. 118). The defendant was in duty bound to disclose all of the material facts which it failed to do because of its adverse position, and concealed the facts, and the appellants did not discover

them until the publication of the opinion of the court in November, 1944 (R. 119).

The facts were relied on in opposition to defendant's motion for a summary judgment and to the defense of the statute of limitations (R. 121). These facts were not denied, and for the purpose of the motion must be deemed admitted. On a motion for a summary judgment every doubt must be resolved against the movant. This court has admonished the lower courts not to favor summary judgments.

In *Doehler Metal Furniture Co.* v. *United States,* 149 F. (2) 130, the court said at page 135:

> "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. *A litigant has a right to a trial where there is the slightest doubt as to the facts,* and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But, although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. *Denial of a trial on disputed facts is worse than delay. Cf. Arenas* v. *United States,* 322 U. S. 419, 429, 433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U. S. 620, 624, 64 S. Ct. 724, 88 L. Ed. 967, tells us that, especially where, as here, damages are in question, the courts should go slow about making haste by a summary judgment; there the Supreme Court said that 'at least a summary disposition of issues of damage should be on evidence which a jury would not be at liberty to disbelieve and which require a directed verdict for the moving party.'"

A summary judgment cannot be entered if there be any issue of fact sustaining the claim of the adversary (*Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620).

In *Parmelee* v. *Chicago Eye Shield Co.*, 157 F. (2) 582 the court pointed out that a summary judgment cannot be entered where there are genuine issues of fact. The "burden" is on the "movant" to show an absence of issues of fact and *all doubt must be resolved against the movant.*

In the face of these facts and of the opinion on the prior appeal which called for a trial on the merits, the judgment in this case for the defendant cannot stand and it should be reversed, and the judgment of the Court of Appeals to dismiss for lack of jurisdiction should also be reversed.

CONCLUSION.

The Court of Appeals was without jurisdiction to direct the dismissal of the action for want of jurisdiction in the absence of any appeal on the jurisdictional question which was determined below and it then became *res judicata.* The decision of the District Court that the action was barred by the ten-year Statute of Limitations is without any foundation. It follows that the writ should be granted.

Respectfully submitted,

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January 19, 1948.